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United States Supreme Court

October Term 1900.

A. J. KIZER,	Plaintiff in Error,
VS.	
THE TEXARKANA & FT. SMITH RAILWAY COMPANY.	Defendant in Error.

In Error to the Supreme Court of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

OSCAR D. SCOTT,
Attorney for Plaintiff in Error.

CHAUNCEY PRINTING CO., TEXARKANA.

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THE TEXARKANA & FT. SMITH RAILWAY COMPANY. } Defendant in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

On the 16th day of September, 1891, the parties hereto entered into the following written contract, viz.

STATE OF TEXAS, }
BOWIE COUNTY. } This agreement by and between W. L. Whitaker, as President, Manager and Owner of the Texarkana & Ft. Smith Railway Company of the first part, and A. J. Kizer for himself and his associates, heirs, successor and assigns of the second part, witnesseth.

1. That the party of the second part, individually or associated with others in partnership or incorporation as he may elect, agrees to construct and maintain a saw mill in Little River County, on the line of said railway, for the manufacture of pine, oak and other kinds of lumber, at a point already selected by the party of the second part.

2. That the party of the second part agrees in consideration of the foregoing, and for and on behalf of said railway and said company to furnish cars and ship all lumber manufactured by said mill for said party of the second part, for his heirs, successors and assigns of said mill over all routes on which lumber is usually shipped from Texarkana, Texas and Arkansas, at a rate not to exceed two cents per hundred pounds over the rates charged by the different railway companies from Texarkana.

This contract to be in force until January 1st eighteen-hundred and ninety-seven, (1897) A. D.

SEAL

Texarkana Ft. Smith Railway Co.,
By W. L. Whitaker, President.

Printed Record pp. 6, 21 and 54.

The place designated and where the mill was afterwards located was Rankin, in Little River County, Arkansas. At the time of the entering into this contract, the railway had not been completed to Rankin, and Kizer had cleared off the ground for a mill site at that place, and obtained options on timber or timber lands near there. The railroad was only completed to Ogden, Arkansas, in September, 1891. Ogden is 13 miles from Texarkana, Rec. 50, and Rankin is 23 miles from Texarkana, Rec. 50 and 30, to which point the railroad was completed in December 1891. Immediately upon the completion of the road to Rankin, Kizer shipped his saw mill to that place, put the same in operation, and ever afterwards operated it in compliance with his undertaking in said contract. The railway company hauled all the lumber shipped from this mill under the terms and at the rate stipulated until November 30th 1892. Rec. 55, 56. After making the con-

tract Kizer purchased 10,000 or 12,000 acres of land in Little River County. The capacity of his mill was 35,000 feet per day and the average output of the mill per month, between 550,000 and 600,000 feet. Rec. 23. At the time of the execution of the contract the defendant had no established tariff freight rates from Rankin. Rec. 55. The shipment from Rankin, which is in the State of Arkansas, over the line of the Texarkana & Ft. Railway which crosses Red River from Arkansas into Texas is Interstate Commerce. In December 1892 the railway commenced charging Kizer more than the contract price for hauling his lumber, and he at once in writing protested and called the attention of the Railway Company to the overcharge, Rec. 56. In the shipment of lumber, the same is sold to be delivered at various points at a certain price. The freight is paid by the seller, but as a matter of fact, the freight is advanced by the purchaser to the Railway Co., that makes delivery, and the purchaser then credits himself for the freight paid upon the purchase price of the lumber. Of course the freight rates charged upon these expense bills must be paid before delivery of the lumber, Rec. 25. The defendant continued to make overcharges which amounted to $1304.15 up to the time of the institution of the suit and subsequently and before the trial other overcharges to the amount of $566.23 had been made and all paid by Kizer. These last overcharges were brought into this suit by an amendment to the complaint, and the suit was to recover all these overcharges, Rec. 57 and 5 to 17 inclusive. The answer of the Railway Co. alleged among other things that the traffic was interstate commerce, that the contract sued on was unreasonable and constituted an unlawful discrimination

against the rest of the public and that the contract was void. Rec. 18. The cause was tried before the Circuit Court of Little River County, Arkansas, without a jury, and that Court made the following written findings of fact and declaration of law.

"The Court finds that on the 15th day of September 1891, the plaintiff and defendant entered into a contract in writing whereby plaintiff agreed to construct and maintain a saw mill in Little River County, Arkansas, on the line of defendant's road, already selected by plaintiff for the manufacture of pine, oak, and other kinds of lumber, and the defendant agreed on its part to furnish cars and ship all lumber manufactured by said mill for plaintiff on all roads over which lumber is usually shipped from Texarkana Texas and Arkansas at a rate not to exceed two cents per hundred pounds over the rates charged by the different railroad companies from Texarkana, and that plaintiff has in all things complied with his part of said contract, but that defendant from and after the 30 day of November, 1892, has refused to ship such lumber for plaintiff at the contract price, but has charged plaintiff a greater rate for shipping said lumber than the rate provided by such contract, and that plaintiff was compelled to pay such higher rate in order to get his lumber shipped. That the contract was executed on the part of the defendant by W. L. Whitaker, who was then the President and General Manager of the defendant company and as such had authority to make freight rates and to execute a contract fixing the rate for shipment of freight, that at the time the contract was entered into, the defendants road was not completed to Rankin, the point where plaintiffs' mill was located and that no freight rates had been established in Arkansas for the shipment

of freight for that point; that defendant did establish the following rates November 15th 1892 to take effect November 30th 1892, not to exceed three cents per hundred pounds from any point on defendant's road to Texarkana. When said instrument was signed by Whitaker it was contemplated that the plaintiff and Wm. Buchanan and B. T. Estes should be associated with him in the establishment of the saw mill mentioned in said instrument. Buchanan and Estes were directors the defendant company, and Whitaker was its president and general manager at that time. The contract was written by Estes, who is the plaintiff's father-in-law. The defendant company then had its regular constituted board of nine directors. There was no action of said board of directors authorizing or ratifying the execution of said contract made by Whitaker shown by the minutes of the company. In September 1891 the defendant's railroad extended from Texarkana northward through Bowie County in the State of Texas, and across Red River past Ogden in Little River County, Arkansas, a distance of about fifteen miles and at the time of the execution of said contract by Whitaker, saw mills were located on the line of said railroad at Corbin, Texas, at Ogden Arkansas, and other points. Plaintiff had selected and established the site for his saw mill at Rankin, about 25 miles north of Texarkana, in 1890 before the contract sued upon was executed. The defendant's road was in process of construction northward and was completed to said Rankin in December 1891. As soon as the road reached Rankin the plaintiff put in his saw mill there and by agreement between himself and defendant became and has ever since been and still is the defendant's regular local agent at said town of Rankin, and as

such agent had and has control of defendant's local and passenger business at that point. When the contract sued on was signed by Whitaker the defendant's regular tariff rate for the transportation of lumber from Corbin to Texarkana charged and collected from the mill owners at Corbin was $10.00 per car of 30,000 pounds, and when the road reached the different mills the rate for shipments of lumber originating on said railroad at Corbin, Ogden and other points were regulated, and so understood by the shippers to points on other railroads beyond Texarkana in accordance with such traffic arrangements as might exist from time to time between the defendant and its connecting carriers at Texarkana. It was customary for the connecting roads leading out of Texarkana to allow the defendant certain pro rates on all shipments of lumber originating on defendants line and the defendant gave the shippers on its line the benefit of such pro rates. When such pro rates amounted to as much as four cents per hundred pounds the defendant allowed the shippers on its line the same through rate as were enjoyed by the shippers from Texarkana. When such pro rates were less than four cents per hundred pounds the defendant charged shippers an "arbitrary" of an amount sufficient to make up said 4 cents. Lumber cannot be transported from Rankin and other points on defendant's line to Texarkana, without loss to the railroad at a less rate than 4 cents per hundred pounds. In November 1892 the defendant's connecting carriers all withdrew their pro rate arrangements and ceased to allow it any pro rates at all; whereupon the defendant, after fifteen days previous notice, established and published at all stations along its line a rate of three cents per hundred pounds on all shipments of lum-

ber to Texarkana. The defendant's regular established rates varied from 2 and 3 to 4 cents per hundred during the time complained of by the plaintiff in accordance with the pro rate allowed to it by the connecting carriers, and the defendant has demanded of and collected from the plaintiff the same rate for transporation of his lumber as were contemporaneously charged other shippers and the public in general under the same circumstances and conditions and no more.

In December 1891 W. A. Williams became general manager of and the only authorized traffic agent of the defendant. In December 1892 the defendant company was re-organized and its properties and franchises and securities were purchased by the present management of the road, who had no notice or knowledge of the existence of the contract sued on. The defendant's tariff rates on shipments of lumber from points along its line were regularly furnished to plaintiff, who knew at the time he made each shipment complained about the established rate which would be charged himself as well as the rest of the public. After plaintiff made his first shipment at the 3 cent rate, which shipment was on January 12th 1893, from Rankin to La Junta, Colorado, and after said shipment had been delivered to the consignees, the plaintiff wrote to Whitaker and to W. A. Williams, general manager and traffic agent, protesting against the rate which had been charged, and calling attention to the contract which had been executed by Whitaker. This was the first that Williams or the management of the road at that time knew of the existence of the contract, and Williams at once interviewed Kizer and repudiated the contract as illegal, and notified Kizer that he would be charged on

all shipments the same rates as other shippers were charged, and that he must be governed by the regular established rates of the defendant as promulgated from time to time. After which the plaintiff made the shipments mentioned in his original and amended complaint, whereupon he was charged by the defendant the sums mentioned in said complaints in excess of the rate specified in the contract sued upon. But the charges made in all cases were in accordance with the regularly established and adopted tariff rates of the defendant." Rec. 54-57.

CONCLUSIONS OF LAW.

"The Court concludes that the contract sued upon in this case is void and cannot be enforced, and inasmuch as the plaintiff has paid no more than the other shippers under the same circumstances and conditions, such contract is unlawful and prohibited by the interstate commerce act, and is void" Rec. p. 57. To this declaration of law Kizer at the time excepted, Judgment was rendered in favor of the Railway Co. Kizer filed his motion for a rehearing, setting forth therein that the Court erred in its declaration of law, which being overruled, he appealed to the Supreme Court of Arkansas where the judgment was affirmed by a divided Court, and in the opinion of the Court affirming the same it is stated; "We are of the opinion that the facts as found by the Court as set out in the statement of facts, show that the contract upon which the appellant relies is within the prohibitions of sections 1, 2 and 3 of the interstate commerce law enacted by Congress."

And again, "This contract upon which appellant relies, proposed to allow appellant a special rate, in no event to exceed two cents per hundred pounds. This would give appellant

an unreasonable preference and advantage over other shippers of lumber in the same county of from one to two cents per hun- pounds." Also at the conclusion of the opinion, "We think the contract relied on in this case is prohibited by the act of Congress to regulate commerce, and is void." Rec. p 60.

Kizer moved for a rehearing setting forth that the Court erred in holding that the contract relied on was prohibited by the act of Congress to regulate commerce. Rec. 66. This motion for a rehearing was overruled and Kizer has sued out a writ of error to this Court.

THE ASSIGNMENT OF ERRORS SET FORTH.

1. "That the Court erred in holding that the facts in this case as found by the Lower or Circuit Court as set out in the statement of facts show that the contract upon which plaintiff, Kizer relies is within the prohibition of sections one, two and three of the interstate commerce law enacted by Congress.

2. The Court erred in holding that the contract to allow appellant, Kizer, a special rate in no event to exceed two cents per hundred pounds, would give him an unreasonable preference and advantage over all other shippers of lumber in the same county.

3. The Court erred in holding and deciding that said contract was within the provisions of the interstate commerce law.

4. The Court erred in holding that the contract relied on in this case is prohibited by the act of congress to regulate commerce.

5. The Court erred in holding that said contract was void by reason of the provision of said interstate commerce act.

6. The Court erred in rendering a decree and entering

judgment in favor of the defendant and against the plaintiff. R. 4.

There is but one single question presented: Was this contract relied upon in this case, one that is prohibited by the act of Congress to regulate commerce, being the act usually called the Interstate Commerce act? If so, then the judgment of the Supreme Court of Arkansas is correct, if not so prohibited, then its judgment is erroneous and should be reversed.

It will be observed that at the time of the execution of this contract, the railroad had not been completed to Rankin and that there were no published tariff freight rates from that point. It will not be contended that the contract at that time was invalid. Both parties acted upon and lived up to the provisions of this contract for about one year from the time Kizer established his mill at that place. No complaint is made that it was an invalid contract during that time.

But it is claimed that because the railroads leading out of Texarkana, that had before been carrying the lumber delivered to them by the Texarkana & Ft. Smith Ry. Co. and giving it a rebate of from two to four cents per hundred pounds in Nov. 1892 withdrew their rebates refusing thereafter to allow the Texarkana & Ft. Smith Co. anything, permitted the Railway Co. to ignore and break this contract, and that in so doing the Railway Co. is protected by the legislation of Congress regulating Interstate Commerce.

So long as the Railway Co., could collect from two to four cents per hundred pounds from its connecting carriers, the contract seems to have been by it considered reasonable and valid, but as soon as these connecting carriers, whether rightfully or wrongfully, refused to allow any pro rates, then the contract

seems to have become unreasonable and invalid.

But it is a broader question that is presented and an important one to the business world, and that is, whether or not a shipper cannot by a special contract, valid at the time it is executed, have the full benefit of such contract for a reasonable time in the future, notwithstanding the Interstate Commerce act of Congress.

"Contracts valid when made, continue valid and capable of enforcement, so long at least, as peace lasts between the goverments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation.

The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse.

The arguments of the plaintiff's in error would lead to the abrogation of all contracts of the Iowa Railway Company which might prove from such subsequent events to be more onerous than contracts made after such events had happened. A contract for example for the supply of coal for the engines of the Company, made upon terms which were at the time reasonable, might be felt to be very hard and oppressive, if before the termination, the discovery of new fields of coal in the vicinity of the road should reduce the market price of the article one half. To assert that the enforcement of a contract of this kind would be repugnant to the commercial power of Congress, because the

expenses of transportation would be less if the contract were annulled, would not be more extraordinary than the position assumed by the appellant in the present case, and would be equally entitled to consideration.

When counsel speaks of the public policy as established by the Acts of Congress mentioned, he must mean nothing more than that the Acts were intended to facilitate commercial intercourse among the states. Undoubtedly such was the case, and it is of great public interest that such intercourse should be free and untrammelled. But if comparisons may be made with respect to a subject of this nature, we should say that the observance of good faith between parties and the upholding of private contracts and enforcing their obligations are matters of higher moment and importance to the public welfare, and far more reaching in their consequences."

Dubuque vs. R. R. Co. vs. Richmond, 19 Wall. 584.

True, this decision was rendered before the enactment of the Interstate Commerce Act, but since its enactment we find the following:

"The act to regulate commerce does not undertake to deal with the subject of rates for transportation services or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination and shall confer no undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations the act does not and was not intended to restrict the common law right and power

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of the common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances so as to promote their own interest while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to carriers the right to give or make lower rates based on increased quantity or amount of service."

And again.

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded sound and adopted in other trades and pursuits."

Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 43 Fed. R. 37.

This case was affirmed in this Court.

Interstate Commerce Commission vs. Baltimore & Ohio Ry. 145 U. S. 263.

The same is sustained in

Texas & Pacific Ry. vs. Interstate Commerce Commission 162 U. S. 197.

If now, as above stated, this Railroad Company at the time it entered into this contract, had power to make special contracts and to manage its interest upon the same principles which are regarded as sound and adopted in other trades and pursuits, can it be doubted but that the parties had the right to enter into this contract? There being at that time no authorized or adopted rates from Rankin, there were no rates with which there could be any conflict and it was certainly good for both parties to enter into this or a similar contract.

This was a new railroad extending out through a sparcely populated territory which is but a continuation of the yellow pine forest that covers the greater part of South West Arkansas, North Louisiana and North East Texas. The only local export this road could hope to have for years was this pine lumber. By reason of the road having no other outlet than through Texarkana, by this contract this portion of this one pine forest could compete with other portions.

It was for the business interest of the railroad to encourage the building up of the saw mill industries along the line of its road by such contracts good for a limited time until such industries had become established, and at the same time add to the freights and business of this infant railroad, and it was also good for Kizer to obtain a contract permanent for a reasonable time as to the freight rates to be charged for the shipment of his mill products. In fact, we do not conceive that any prudent business man could have done otherwise than Kizer did. Who would go out into a wild country to establish a manufactory where all the products must be shipped to distant markets, and where the only carrier is but one uncompleted local railroad,

without first obtaining some kind of a reasonably permanent contract as to these rates? To say that the railroad could not make such a contract would be to say that the carrier was not "free to make special contracts looking to the increase of their business."

The Texas Railway Commission Act provides:

"If any railroad subject hereto, directly or indirectly or by any special rate, rebate or drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited. Revised Statutes of Texas §4574.

In a case where the plaintiff contracted in the early part of the year for freight rates for the summer on a crop of watermelons to be by him planted and the defendant a Railway Company, refused to carry out this contract, whereby damage was alleged to have accrued, the Court of Civil Appeals of Texas in reversing a judgment that had been rendered by the District Court, say:

"It is contended by the appellee that the contract was void also because it was an agreement to do what appellee was legally required to do, and, by virtue of the effect of the Commission Act, the contract was without consideration to support it. This position would be entitled to weight if the law was such that a railway could charge for transportation only at some rate previously fixed by the Commission, no more and no less. But

that is not the statute. The act, as we understand it, even when rates have been fixed, does not enjoin the railway company from charging a less rate than the Commission has named, provided it makes no discrimination, (Secs. 14 and 15) and therefore, even in cases where the Commission has fixed the rates for a railway company, it cannot be said that it is powerless to make contracts for transportation."

Thompson vs. San Antonio & A. P. Ry. Co., 32 S. W. Rep., 427.

We understand the Inter-State Commerce act of Congress must be interpreted in the same manner, that even if the Road has established and approved rates, there is nothing in the act that prevents the carrier from voluntarily reducing these rates, especially in order to increase its business. Of course, having made the change for one shipper, it might be required to make the same change for all other shippers under like circumstances and conditions, but whether or not the railroad company might not be compelled to give the others similarly situated the same rates is not the present question, if it had the right at the time of its execution to make this special contract.

The fact, if it be true, that this contract eventually proved to be an unfortunate and losing one for the Railway Company can be no sufficient defence to its validity. Innumerable are the contracts made between parties that prove disastrous to one of them and yet we have never seen this defence standing by itself to prevail in a Court of Justice. Had Whitaker, the president, manager and owner of this railroad with the same prudence and foresight that Kizer exercised, made contracts with his connecting carriers at Texarkana, that until the 1st of January 1897,

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his road should receive from them two cents per hundred pounds on all lumber turned over to them as connecting carriers, then he would have been protected, but this he did not do and so far as the proof shows did not attempt to do, but made this absolute contract with Kizer assuming that during its continuance he, Whitaker, would at all times be able to obtain these rebates that were then being granted to his road. It seems to us clear and conclusive that both morally and legally the Railroad and not Kizer should be responsible for the loss occasioned by the Railroad's breach of this contract.

Where parties agreed in a contract in consideration of of money for the development of ore and the construction of a furnace and railroad, to give all their traffic to the Railway Company, the Supreme Court of Pennsylvania in an action in equity, reversed the ruling of the Lower Court in sustaining a demurrer to the bill and sustained the covenant requiring the covenantors to ship over said Railway.

Bald Eagle Valley R. Co. vs. Nittany Valley R. Co. 33 Atlantic R. 239.

In the decision the Court says:

"The right of every shipper is to make a contract with such common carriers as he chooses to carry his goods to destination. If he makes none expressly, the law implies one with the carrier who accepts his goods. But he cannot make contracts with two or more carriers to carry the same goods. If he do, as but one can carry, the others can invoke the law as a remedy for his violation of contract. If he contracts with a railroad to lay its rails to his manufactory or furnace, and furnish him money to aid him in bringing the raw material to the furnace, and he

in consideration, promises to give the railroad company the transportation of such manufactured product to market at reasonable rates, how is the shipper deprived of any right? He but exercises the right guaranteed by the constitution. He contracts for the carrying of his own product for shipment to market, from his own manufactory, with whom he pleases. The constitution does not go further, and guaranty him a right to violate his contract when he pleases."

Suppose now that in November 1892 another railroad had been built from Texarkana to Rankin and that Kizer had commenced to ship over this new road, under the law as announced in this Pennsylvania decision Kizer could have been enjoined from so doing. Would not he have at once been laughed out of Court, if for his answer in this injunction suit, he should set up, that the rates he was then getting under his contract with the defendant in error in this case were so low that the defendant in error was losing money on each piece of lumber transported. Again if at the time the connecting carriers withdrew their rebates, the Railway Co., had believed this withdrawal was but temporary, or for any other reason had concluded it still desired to continue its written contract with Kizer, could Kizer have declared the contract at an end, and commenced having his lumber carried to Texarkana by some other means of transportation without being liable to the Railway Company for damage for his breach of this contract.

The Circuit Court of Appeals for the Fifth Circuit in passing upon the Interstate Commerce Act say: "On the contrary as we read the act it is strongly implied that the carrier will not only be liable to the government and to any private party injur-

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ed for its violations of the provision of the interstate commerce act, but that it will also certainly be bound on its contracts. If it were otherwise it would, as we have said put on shippers a burden too grievious to be borne, and open a door to the practice of fraud and oppression by the agents of corporation carriers."

Pond-Decker Lumber Co. vs. Spencer, 86 Fed. R. 846.

"A common carrier has the right to contract to ship freight at a lower rate than the published tariff rate, if he choose to do so; and such a contract is not against public policy, unless the privilege to ship at such rates is granted exclusively to the shipper with whom it is made, or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination and renders the contract void as against public policy."

Christie vs. Missouri Pac. Ry. Co., 94 Mo. 453, S. C. 7 S. W. Rep. 457.

It will be observed that Kizer's contract did not specify that he was to have any advantage over any other shipper simularly situated. By this contract no discrimination was made between Kizer and other shippers. None was intended, but the only object was to obtain for a definite term definite maximum freight rates, which were then lawful.

The Interstate Commerce Commission through Judge Cooley, its chairman, in *re*, Chicago, St. Paul and Kansas City R. Co. 2 Interstate Commerce Commission Rep. 137 in a well considered opinion held that, "The provisions in the act to regulate commerce, that all rates shall be just and reasonable, was a provision inserted for the protection of the general public, and not for the protection of the carriers against the action of their own of-

ficers or against the action of rivals. The carriers were supposed to have means of self protection against unreasonably low rates in the power they had to make the rates themselves."

In this case Judge Cooley used the following language:

"But every statute is to be read in the light of its history and of the evils it was intended to redress. And as matter of public history, nothing can be more notorious than that the Act to Regulate Commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for its service, should have the benefits which the law had undertaken to give, but of which, in very many cases, it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other. The act does, indeed, require them to afford reasonable, proper and equal facilities for the interchange of traffic between their respective lines: but even this requirement was for the public benefit more particularly than for the benefit of the carriers themselves. Everywhere in the Act the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public, be wronged by arbitrary conduct, or by favoritism, or be subjected to extortion. It is to this end that the act declares that all charges made by the car-

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rier it regulates shall be reasonable and just, and the purpose of the declaration is to establish the rule that the charges shall not be extortionate."

Again, there was no finding that the rate given Kizer was not a just and reasonable rate. True, the Circuit Court found that "lumber cannot be transported from Rankin or other points on defendant's line to Texarkana without loss to the railroad at a less rate than 4 cents per hundred pounds."

In Ry. Co. v. Smith, 60 Ark., 221, it is held that because the rates are so low and unremunerative that the railroad cannot be operated without an actual loss, is not sufficient to show that the rates are unreasonable.

To the same effect:

Ry. Co. v. Gill, 54 Ark., 112.

Reagan v. Farmers L. & T. Co., 154 U. S. 362.

The plaintiff and defendant entered into a legal and proper contract as to freight rates that was to last for five years. This contract was carried out for one year, when the defendant, without any just or legal cause, violated this contract and voluntarily established higher freight rates. This it was not compelled to do, either by statute or any order of the Inter-State Commerce Commission. Can the Railway Company now claim that its wrongful act in thus voluntarily increasing its rates is a defence to its breach of contract?

We, therefore insist that the contract that is the basis of this suit is a valid contract, and that the decision of the Supreme Court of Arkansas in holding said contract to be void because in conflict with the Act of Congress to regulate commerce is erroneous, and as that was the sole question decided, we pray that

the judgment of the Supreme Court of Arkansas in affirming the judgment of the Lower Court may be reversed, and for other relief.

Respectfully Submitted,

OSCAR D. SCOTT,

Attorney for Plaintiff in Error